

STATE OF NORTH CAROLINA  
COUNTY OF MECKLENBURG

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
06 EDC 1284

*Student* by and through his parents, )  
*Father* and *Mother*, )  
Petitioners, )  
)  
)  
vs. )  
)  
Charlotte-Mecklenburg Board of Education, )  
Respondent. )

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**FINAL DECISION**

THE ABOVE-ENTITLED MATTER was heard before the undersigned Administrative Law Judge William A. Creech on October 23, 24, and 25; November 6, 7, and 20; and December 7, 2006.

**APPEARANCES**

For the Petitioners: Lisa C. Flowers  
Children's Law Center/Council for Children's Rights  
601 East 5<sup>th</sup> Street, Suite 510  
Charlotte, NC 28202

For the Respondent: James G. Middlebrooks  
Helms, Mullis & Wicker  
201 N. Tryon Street  
Suite 3000  
P.O. Box 31247  
Charlotte, NC 28231

**FINDINGS OF FACT**

1. At all times relevant to this action, Petitioners resided in Mecklenburg County and *Student* attended Charlotte-Mecklenburg Schools (CMS). *Student's* date of birth is \*/\*/93.
2. *Student* moved to North Carolina with his parents, (*Mother* and *Father*) in 2002. He started the 2002/2003 school year as a second grade student at ABC Elementary School Elementary School. Tr. Vol. 4, p. 3, ll. 18; p. 9, ll. 9-11.
3. *Student* was initially evaluated for exceptional children's services in kindergarten when he lived in New York. *Student* was classified as behaviorally-emotionally disabled and he was placed at a therapeutic day school in 12-month program. The school placed him in that program due to the regression *Student* had over the summer months. He also received occupational

therapy, speech, and counseling services. *Student* was retained in first grade. Tr. Vol. 4, p. 4, ll. 21-25; p. 5, ll. 1-9; p. 7, ll. 1-25; p. 8, ll. 4-25; p. 9, ll. 1-8; Vol. 5, p. 17, ll. 7-19; Pet. Ex. 110.

4. Shortly before coming to North Carolina, *Student* was diagnosed with Aspergers Syndrome. The TEACCH Center in Charlotte evaluated *Student* and confirmed a diagnosis on the autism spectrum. Tr. Vol. 4, p. 14, ll. 1-7. On November 5, 2002, *Student's* area of eligibility changed from emotionally handicapped to autistic. Tr. Vol. 4, p. 15, ll. 4-10; Pet. Ex. 99.

5. During the 2004/2005 school year, *Student's* diagnosis changed from autism to Pediatric Autoimmune Neuropsychiatric Disorder after Streptococcal Infections (PANDAS). *Mother* testified that, based on how it has been explained by *Student's* Neurologist, her understanding of PANDAS is that it is an autoimmune disorder that causes inflammation of the basal ganglia of *Student's* brain when he gets a strep infection. The basal ganglia is responsible for both movement and behavior. Tr. Vol. 4, p. 30, ll. 10-25; p. 31, ll. 1-23; Vol. 5, p. 9, ll. 18-24.

6. *Mother* testified that some of the ways PANDAS affected *Student* included never sitting still, tics, head banging, nail biting, arm and leg flapping, weak and falling all the time. *Mother* testified that the movement part of the disorder progressed to the point that the neurologist described it as a Parkinson's like complex movement disorder. *Student* would flail his arms, walk and bump into walls and people. *Student* got teased by his peers and punished at school at times for some of his involuntary movements. It reached the point where *Father* had to carry *Student* up the stairs at bedtime because *Student* could not walk up the stairs. Tr. Vol. 4, p. 32, ll. 11-24; Vol. 5, p. 53, ll. 13-25; p. 54, ll. 1-3; Pet. Ex. 145

7. *Mother* testified that PANDAS affected *Student's* behavior. *Student* has extreme mood swings that can change rapidly. One minute he can be extremely happy and two minutes later he can be suicidal. *Student* exhibits hyperactivity. Currently, *Student* has extreme anxiety and obsessive-compulsive behaviors. He has irrational fears of the dark, the devil, loud noises and transitional things like going to a new place. *Mother* testified that when *Student* gets obsessive he will tell her that he can't stop and that she will have to wait until he gets it out of his head. Tr. Vol. 4, p. 33, ll. 2-10; Vol. 5, p. 10-11. .

8. *Student* can have extreme rages. Over time *Mother* and *Father* have learned that this is part of *Student's* obsessive-compulsive behavior. *Mother* described the circular cycle that *Student* goes through when that behavior begins. *Mother* and *Father* have recognized the beginning stages when *Student* is beginning to get upset. During that stage it is possible to reason with him and stop it. However, if he moves to the top of the circle, he has to continue with the whole cycle until he is able to calm down again. At that point, *Mother* and *Father* have learned that there is no reasoning and it is better to ignore the rage until he is able to calm himself. *Mother* testified that when *Student* was younger those rages could go on for three or four hours. Now, through therapy and medication, if *Student* gets to that stage the rage can last up to an hour. Tr. Vol. 5, p. 12-13

9. During the 2004/2005 school year, *Student* began receiving intravenous immunoglobulin (IVIG) treatments for PANDAS. Because PANDAS is an autoimmune disorder the IVIG treatments were meant to strengthen *Student's* immune system in order to prevent any further

deterioration in *Student's* basal ganglia. After receiving IVIG treatments, *Student's* movement problem disappeared. Tr. Vol. 5, p. 54, ll. 4-25.

10. *Mother* and *Father's* concerns regarding *Student* started in infancy. *Mother* described that what distinguishes *Student* from other children is the intensity that *Student* does everything, including things that he enjoys. As an infant, *Student* was difficult to cuddle; had issues with food, including not keeping food down; and was difficult to calm down. *Mother* testified that *Student* gave up naps by eight months old and only slept a few hours a night until he was 5 or 6 years old and he started taking medication. Tr. Vol. 4, p. 35, ll. 3-22; Vol. 5, p. 11, ll. 1-25.

11. *Student* currently takes Lithium and Abilify to help with his rages and stabilize his mood. He recently started taking Paxil to help with anxiety. Tr. Vol. 5, p. 14, ll. 1-10.

12. *Mother* testified to the emotional and behavioral difficulties *Student* has had from a young age. His early diagnosis included obsessive-compulsive disorder (OCD), bipolar, schizophrenia. Tr. Vol. 4, p. 12, ll. 23-25; p. 13, ll. 1-21. Shortly after beginning the 2002/2003 school year, *Student's* area of eligibility changed to autistic. *Student* spent his second grade school year in a cross-categorical self-contained classroom.

13. *Father* and *Mother* have sought answers and help for *Student* from many different sources for many years, including psychologists, psychiatrists and neurologists. Tr. Vol. 4, p. 36, ll. 1-23. *Mother* described her attempts at educating herself each time *Student* received a new diagnosis. She researched on the Internet, bought books, called other doctors, consulted with homeopathic specialists and joined several support groups. Tr. Vol. 4, p. 37, ll. 2-20.

14. *Mother* is currently a member of the Child and Adolescent Bipolar Foundation an online support group where she has received suggestions for medications, educational books and tapes, and suicide hotline numbers. Tr. Vol. 4, p. 39, ll. 2-14.

15. *Mother* testified that *Student* does not understand what friendship is and that he is perceived as "the odd boy" by his peers. *Student* is teased by his peers and has been bullied in school. *Mother* and *Student* informed the school personnel about bullying incidents. Tr. Vol. 6, p. 218, ll. 21-25; p. 219, ll. 1-9; Pet. Ex. 132; Pet. Ex. 47. However, the school did not address the situation.

16. He has sensory integration issues that require stress relievers such as chewing gum and squeeze balls when he is overstimulated. Tr. Vol. 4, p. 51-52; Pet. Ex. 47.

17. *Student* is very disorganized. His homework is crumpled in the bottom of his backpack, his agenda is torn, and he loses backpacks and lunchboxes.

18. *Student* does not differentiate between children and adults and does not understand that in some situations it is inappropriate to speak to adults the same way he talks to his peers. Tr. Vol. 4, p. 40, ll. 19-25; p. 41, ll. 1-18.

### **2002/2003 SCHOOL YEAR**

19. Prior to moving to North Carolina, *Mother* contacted CMS's EC Department because she wanted to be sure *Student* would receive the same level of services in North Carolina that he received in New York. CMS gave *Mother* the choice of two elementary schools and assured that *Student* would receive whatever services were contained in his Individualized Education Plan (IEP). Tr. Vol. 4, p. 9, ll. 12-25.

20. When *Student* started at B., he was placed in a cross-categorical, self-contained class for kindergarten, 1<sup>st</sup> and 2<sup>nd</sup> grade students. There were 12 students in his class. *Student* had many transitional issues due to the family's move and being in a new school, but he liked his teacher, Ms. N. Tr. Vol. 4, p. 10, ll. 12-23; p. 11, ll. 7-17; Vol. 5, p. 16, ll. 10-25. When *Mother* inquired about a 12-month program like *Student* attended in New York, she was told that CMS did not have such a program. The only comparable option was extended school year (ESY) services which provided some tutoring over the summer. Initially, when *Mother* requested ESY, CMS rejected her request because the school had not provided certain documentation. Mrs. North, *Student's* teacher, did not know about the documentation. *Student* ultimately received ESY services that summer. Tr. Vol. 5, p. 22-23. *Student* was promoted to the 3<sup>rd</sup> grade despite receiving all "1"s on his report card in Literacy and Mathematics. A 1 means the student "does not yet meet expectations for Grade 2. Pet. Ex. 33

21. *Mother* worked as a second grade teacher assistant at ABC Elementary School during the 2002/2003 school year for two classrooms. She testified that she enjoyed working as teacher assistant and is still good friends with one of the teachers she worked with. Tr. Vol. 4, p. 18, ll. 4-25; p. 19, ll. 6-8. *Mother* did not return the following year because *Student* was having difficulties with crying and wanting to come see his mother during the school day. She did not feel it was in his best interest for her to continue working in the school that he attended. Tr. Vol. 4, p. 19, ll. 9-14.

### **2003/2004 SCHOOL YEAR**

22. For the 2003/2004 school year, *Student* moved to a self-contained, cross-categorical class for 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> graders. *Student* seemed to like the class that year because he was with older children. *Mother* testified that it was a good year for *Student* related to his behavior. *Student's* teacher was Ms. W.. Tr. Vol. 4, p. 17, 9-22; p. 27, ll. 1-7; Vol. 5, p. 23, ll. 6-21. CMS promoted *Student* to the 4<sup>th</sup> grade. His report card had As and Bs in all his academic areas. However, his grades were modified and he did not meet expectations for Grade 3 in any academic area. Pet. Ex. 32.

23. *Student* did not receive ESY services the summer after 3<sup>rd</sup> grade despite *Mother's* request. CMS stated that *Student* did not qualify for ESY services that year because *Student* did not show enough regression. CMS provided *Mother* with data sheets containing *Student's* IEP goals that it contended showed that *Student* had no regression. Tr. Vol. 5, p. 24-27; Pet. Ex. 84.

### **2004/2005 SCHOOL YEAR**

24. During the 2004/2005 school year, *Student* remained in Ms. W.'s self-contained cross-categorical classroom as a 4<sup>th</sup> grader. *Student* had a difficult time that year. Because enrollment increased at B., *Student's* classroom changed to a very small, cramped room. Because of the

sensory integration, behavior and physical disabilities of the children in that class, *Mother* requested that the Principal find a larger classroom space for the class.

25. In October, *Student* started exhibiting extreme anxiety regarding school. He did not want to attend school, did not like his teacher, and exhibited suicidal thoughts. *Mother* asked *Student's* teacher if something happened or was going on at school that could explain the increased anxiety. She was told that everything was fine at school. *Student's* doctors increased his medication which caused more side effects. In December, at the class Christmas party, *Mother* learned that another student in the class assaulted and injured the teacher in front of the other students. *Student's* teacher informed *Mother* that she believed *Student* was starting to mimic that child's behavior. In December, *Student* attempted suicide while he attended his afterschool program. When *Mother* brought her concerns to the Principal and inquired as to why parents had not been informed of the assault on the teacher so that they could help their children deal with any emotional issues, the Principal stated that it was out of her hands and that *Mother* could contact CMS's EC Department. *Mother* emailed Ms. A.D. expressing her concerns. She never received a response. Tr. Vol. 5, p. 31-34; Pet. Ex. 138.

26. After the incident in October, the classroom became a negative environment for *Student*. *Mother* inquired as to possibilities for 5<sup>th</sup> grade. On April 26, 2005, an IEP meeting was held to discuss making some changes to *Student's* IEP and the possibilities for 5<sup>th</sup> grade. Tr. Vol. 5, p. 36, ll. 1-8; Pet. Ex. 69. Prior to the meeting, *Mother* had informal conversations with Ms. A.P., an assistant principal at B., who suggested considering placing *Student* be placed in the resource program. *Mother* also talked to the school counselor. *Mother's* primary concern with resource was the instructional level that would be given since *Student* was functioning below grade level. *Mother* wanted to be sure that CMS would remediate *Student* until he was able to function at grade level. Ms. A.P. assured *Mother* that *Student* would get the help he needed at the level he was testing at. Tr. Vol. 5, p. 42; p. 74, 6-24.

27. The IEP team decided that *Student* should go to resource classroom for language arts and math. However, Ms. A.P. informed *Mother* that if they made the change to resource at that meeting, *Student* would have to go to a new school. No changes were made to *Student's* IEP other than removing Occupational Therapy and Adaptive PE. CMS did not document the discussion regarding changing *Student's* placement on the Prior Written Notice from that meeting. Tr. Vol. 5, p. 42, ll. 11-25; p. 43, ll. 21-25; p. 44, ll. 1-18; p. 50, ll. 20-25; p. 51, 1-10; Pet. Ex. 64; Pet. Ex. 65.

28. CMS promoted *Student* to the 5<sup>th</sup> grade. His report card consisted of modified passing grades. His report card gives him 3s in some areas. A 3 means the student "consistently meets expectations for Grade 4." These included all areas of writing which included expressing the main idea clearly, giving supporting detail, organizing writing logically and building vocabulary and applying writing conventions such as grammar, spelling, capitalization, and punctuation. Pet. Ex. 31.

### **2005/2006 SCHOOL YEAR**

29. At the beginning of the 2005/2006 school year, an IEP meeting was held on 8/19/05 to change *Student's* placement to resource. An Invitation to Conference dated 8/18/05 notes a

meeting scheduled for 8/29/05 with *Mother's* signature dated 8/19/05 and a note that the meeting was rescheduled for 8/18/05. No items are checked for the purpose of the meeting. The Prior Written Notice notes that *Student's* setting was changing to resource "[d]ue to progress made through interior small group services." However, no evaluation procedures, tests, or reports are listed as being used as a basis for the change. The only information listed is "other: addendum to change educational setting." Pet. Ex. 59; Pet. Ex. 60.

30. On 8/19/05, *Student's* level of service was changed to four sessions of special education a week at 180 minutes a session. *Mother* understood this to mean that *Student* would receive 90 minutes of resource instruction four times a week in math and language arts. When she inquired as to why *Student* would not receive five days of instruction, she was told that ABC Elementary School did not have resource classes on Thursdays to allow staff to attend IEP meetings. Tr. Vol. 5, p. 97, ll. 8-25.; Pet. Ex. 57.

31. On Thursdays, *Student* went to the regular education classroom. However, he could not keep up with the work. *Student's* teacher assigned another classmate to tutor *Student* and keep him on task. Tr. Vol. 5, p. 98-100.

32. *Student's* resource teacher for math was Ms. MC. His language arts resource teacher was Ms. L. However, because Ms. L. was on leave, *Student* had a substitute language arts teacher, Ms. MS, for the entire first half of the school year. Counsel for CMS stipulated that Ms. MS was a certified birth through kindergarten teacher. Tr. Vol. 5, p.112, ll. 14-15; Vol. 6, p. 183, ll. 23-25; p. 184, 1-24; Tr. Vol. 8, p. 38, ll. 19-25.

33. On 9/1/05, another IEP meeting was held. The Invitation to Conference is dated 9/1/05 with a meeting scheduled for 9/12/05 and a note that the meeting was held on 9/1/05 at 8:00. "Addendum" is listed as the reason for the meeting. Pet. Ex. 58. The Prior Written Notice states that the IEP was addended "to add and delete some of the regular education accommodations and the accommodations for quarterly testing." Again, there were no evaluation procedures, tests, or reports listed as a basis for the change. The only information listed is "other: Addendum." Pet. Ex. 56.

34. On 10/1/05, another IEP meeting was held. The Prior Written Notice notes that the IEP team decided to change *Student's* testing from the NCAAAI to the end-of-grade test for reading and the NC Extend II (an alternative assessment) for Math. The reason for the change was because the NCAAAI had been discontinued. Pet. Ex. 55.

35. *Mother* had concerns as soon as school started. It took about 10 days for ABC Elementary School to set up the resource schedule so *Student* began the school year in all regular education classes. *Mother* inquired several times regarding when resource would get started and she received several different explanations. During this time *Student* was confused and did not understand the work being taught. Tr. Vol. 5, p. 75, ll. 4-25. Mrs. B., *Student's* 5<sup>th</sup> grade teacher, emailed *Mother* on 9/8/05 stating that resource would start on the 9<sup>th</sup>. She then emailed *Mother* on 9/9/05 informing her that resource would not start until 9/12/05. Pet. Ex. 149.

36. In addition, *Student* was being asked to do work that was well above his comprehension level, especially in math. When *Mother* communicated this concern, she was told that because

*Student* had moved from a self-contained class, he would be expected to do 5<sup>th</sup> grade level work. Tr. Vol. 6, p. 180, ll. 8-25; p. 181, ll. 1-5.

37. *Mother* received an Invitation to Conference dated 9/21/05 for an IEP meeting scheduled for 12/1/05. Like the 8/18/05 Invitation to Conference nothing was listed for the reason for the meeting. On 11/22/05, Mrs. M.C. emailed *Mother* verifying that a meeting was scheduled for 12/1/05 to discuss *Student's* needs. Pet. Ex. 152. On 12/1/05, *Mother* came to ABC Elementary School for an IEP meeting. However, Mrs. S., the assistant principal, said that it would only be a meeting with *Student's* teachers and not an IEP meeting. *Mother* expressed her dissatisfaction because she had intended to discuss changes to *Student's* IEP and she had received an Invitation to Conference. Mrs. S. told Ms. L that she could take her concerns to the Superintendent. *Mother* testified that she left the meeting in tears. Tr. Vol. 5, p. 167-173.

38. *Student* received a D in reading and Math and C in Writing and Social Studies on his second quarter mid-quarter progress report. He received 2s for Social Development and Conduct and for Work and Study Habits. A 2 means that he inconsistently met expectations for 5<sup>th</sup> grade. Pet. Ex. 53.

39. *Student* has developed extreme anxiety related to math. While his early years listed math as one of his strengths, it is now *Student's* weakest academic area. During the 2005/2006 school year he would have rages and take hours to complete his homework. At the February IEP meeting, the IEP team decided to make some homework accommodations and provide a math assistant to alleviate some of the anxiety and begin to remediate *Student's* math skills. However, *Student's* math teacher stopped following those accommodations without notifying *Father* and *Mother*. The math assistant did not provide the assistance *Student* needed. *Student* began raging again over math homework. Tr. Vol. 5, p. 243, ll. 5-24; p. 255, ll. 1-25; p. 256, ll. 1-7; Tr. Vol. 6, p. 226, ll. 21-25; p. 229, ll. 1-27; Pet. Ex. 45; Pet. Ex. 120.

40. *Student's* anxiety increased during the school year. *Mother* would receive daily phone calls, usually after *Student* had resource math, from the school office or the school nurse because *Student* was in the office complaining about feeling sick or because he had soiled himself. Tr. Vol. 6, p. 190, ll. 7-25; p. 191, ll. 1-24; Pet. Ex. 127.

41. Four boys who rode the bus with *Student* and were in *Student's* afterschool program bullied *Student* during the school year. *Mother* testified that she reported the bullying to school personnel but nothing was ever done. *Mother* ultimately withdrew *Student* from afterschool and *Mother* and *Father* started transporting *Student* to school. Tr. Vol. 5, p. 187-189; Pet. Ex. 152.

42. On December 19, 2005, *Mother* attended an IEP meeting. Counseling was added to *Student's* IEP and *Student* was to be given an OT, assistive technology and educational evaluation. Pet. Ex. 49; Pet. Ex. 50; Pet. Ex. 52. In addition, *Student's* homework in math pending the evaluation results due to his extreme frustration level. Pet. Ex. 51.

43. On February 2, 2006, there was an IEP meeting to discuss the evaluation results. CMS evaluated *Student* utilizing the Weschler Individual Achievement Test II (2006 WIAT II). *Student's* scores placed him well below grade level and age equivalents in reading, math, and written language. Pet. Ex. 5; Pet. Ex. 48.

44. The WIAT II results document *Student* at a 3<sup>rd</sup> grade level in most areas, a late second grade level in spelling and written expression, and a 4<sup>th</sup> grade level for reading comprehension. His age equivalent scores placed him functioning at an 8 to 9-year-old level. *Student* was in the 5<sup>th</sup> grade and had recently turned 12 years old at the time he was tested. Pet. Ex. 5; Pet. Ex. 47; Pet. Ex. 48.
45. *Mother* expressed concern that *Student* was not on grade level. CMS's response was that she needed to lower her expectations. Tr. Vol. 6, p. 130, ll. 7-17.
46. *Student* regressed in reading, writing and math when comparing *Student's* broad cluster scores from the 2006 WIAT II scores to the scores he obtained on March 9, 2004 when CMS evaluated *Student* utilizing the Woodcock Johnson III Tests of Achievement (2004 Woodcock-Johnson). Pet. Ex. 80; Pet. Ex. 48; Pet. Ex. 5.
47. The IEP team added some accommodations and related services to *Student's* IEP based on the evaluation results, including occupational therapy, assistive technology, math homework accommodations, and a teaching assistant to assist *Student* during math. *Father* and *Mother* signed the IEP noting that they did not agree. *Mother* testified that she did not agree with it because it did not have enough remediation nor did she agree with only providing four days of resource classes. Tr. Vol. 5, p. 246, ll. 18-21; p. 254, ll. 17-18; Pet. Ex. 43; Pet. Ex. 45.
48. On April 20, 2006, the IEP team met to discuss eligibility for extended school year services. *Father* and *Mother* were surprised at the meeting when they were told that since the meeting in February, *Student* had performed well on the Star Reader standardized test and that he was doing 5<sup>th</sup> grade math work. *Father* and *Mother* had not seen this kind of progress in working with *Student* at home. Tr. Vol. 15-25.
49. *Mother* researched on the internet to find someplace to get an independent evaluation. Through counsel, *Mother* and *Father*, on May 1, 2006, requested that CMS pay for an evaluation from the Student Success Center at All Kinds of Minds in Chapel Hill. In addition, counsel requested reimbursement for the tutoring services *Student* received from Huntington Learning Center. The correspondence was addressed to acting Superintendent Frances Haithcock and requests an answer within three business days. Pet. Ex. 114.
50. Having not received a response, on May 31, 2006, *Father* and *Mother* sent another letter by certified mail and facsimile asking for a response to their previous request before the IEP meeting that was scheduled for June 6, 2006. Pet. Ex. 112.
51. Both letters were also copied to CMS's counsel. Pet. Ex. 112; Pet. Ex. 114.
52. CMS responded with two letters from Dr. M.M., Accountability Specialist for CMS, that were identical except that one copied *Mother* and *Father's* attorney and had a slightly different list of evaluators. While one letter is dated May 21, 2006 and the other is dated June 1, 2006, *Father* and *Mother* did not receive a response to their request until school was out. Tr. Vol. 6, p. 148, ll. 8-19; Pet. Ex. 113; Pet. Ex. 111.
53. The Prior Written Notice from the June 6, 2006 IEP meeting notes that *Father* and *Mother* had not received a response to their request. Pet. Ex. 38.

54. *Dr. M.M.*’s letters deny *Mother* and *Father*’s request for reimbursement from Huntington. He agrees to pay up to \$800 for an independent evaluation from CMS’s approved list. However, he does not even mention *Mother* and *Father*’s request regarding the Student Success Center. Pet. Ex. 113, Pet. Ex. 111.
55. *Dr. M.M.*’s enclosed a Parent’s Rights Handbook but does not comply with the Prior Written Notice requirements of the IDEA nor the notice requirements of N.C. Gen. Stat. § 150B-23(f).
56. The Student Success Center of All Kinds of Minds evaluated *Student* on May 9, 2006 in Chapel Hill, North Carolina. The evaluation took most of the day and was conducted by a pediatrician, licensed psychologist and a learning specialist. *Father* and *Mother* received the Evaluation Summary from the Student Success Center the day before the June 6, 2006 IEP meeting. *Mother* and *Father* paid \$3, 250 for the evaluation. Tr. Vol. 6, p. 158-160; p. 170, ll. 16-18; Pet. Ex. 3; Pet. Ex. 141
57. *Mother* testified that when she read the Evaluation Summary she felt like the Student Success Center “hit the nail on the head” in terms of identifying why *Student* was not learning. Tr. Vol. 6, p. 159, ll. 11-17.
58. On June 6, 2006, the IEP team met to develop an IEP for *Student* to transition to the 6<sup>th</sup> grade and a middle school environment. *Father* and *Mother* presented the Evaluation Summary from the Student Success Center to the IEP team. Pet. Ex. 40;
59. Prior to the meeting *Mother* requested that ABC Elementary School invite the people who would be working with *Student* at the middle school to come. *Mother* also contacted the middle school and CMS’s central office to learn what the school had to offer as far as inclusion and resource. *Mother* received conflicting information. Tr. Vol. 7, p. 30, ll. 14-25; p. 31-38. Pet. Ex. 117; Pet. Ex. 118 prepared for the meeting
60. *Mother* testified that she was concerned about *Student*’s transition to middle school because the environment would be more stimulating. *Student*’s sensory issues make the increased noise associated with changing classes and crowded hallways worrisome. The June 6, 2006 IEP provided some additional accommodations and for an inclusion environment for language arts, social studies and science and resource class for math. However, *Student*’s IEP present levels of performance and goals remained virtually the same as his previous IEPs except that certain benchmarks were actually lowered from previous years.
61. *Mother* signed that she did not agree with the IEP because the IEP did not provide enough remediation and she believes *Student* needs one-on-one instruction. Tr. Vol. 6, p. 257, ll. 8-14; Vol. 7, p. 39, ll. 2-15.
62. At the request of CMS counsel, *Father* and *Mother* requested a summary of the scores *Student* received from the standardized tests utilized by the Student Success Center. The Student Success Center provided a summary of the subtest scaled scores *Student* received. Pet. Ex. 2.
63. *Student* did not receive instruction addressing spelling strategies as outlined in his IEP until February. Tr. Vol. 6, p. 198-200; Pet. Ex. 123.

64. *Student* does not know basic writing conventions and spelling. In fact, *Student's* 5<sup>th</sup> grade teacher told *Mother* that *Student* would fail if she corrected his work according to spelling and writing conventions. Tr. Vol. 5, p. 251, ll. 9-21.

65. CMS promoted *Student* to the 6<sup>th</sup> grade. He scored a 247 on the end-of-grade reading test (EOG). This was right on the line for being considered on grade level and placed him at the 12<sup>th</sup> percentile. *Student's* 5<sup>th</sup> grade report card consisted of passing grades. However, he did not meet grade level expectations in any area except using research and applying decision-making and problem-solving techniques in Social Studies and using materials and equipment safely and appropriately in Science. In fact, in some areas he showed regression during the school year and areas that were reported as being on grade level at the end of 4<sup>th</sup> grade (3s) were now 1s. Pet. Ex. 30. Likewise, he scored below average in all areas of CMS's reading assessment given on 9/8/2006.

66. *Student* took the Extend II Math test at the end of 5<sup>th</sup> grade. Those scores were supposed to be available in October. However, as of the last day of trial, *Mother* and *Father* had not received *Student's* results.

67. *Student's* IEPs have contained many of the same goals year after year. However his progress reports have reported him mostly as "progressing at a rate to meet annual goal." and his present levels of performance have remained virtually unchanged. Pet. Ex. 41; Pet. Ex. 144; Pet. Ex. 148

68. Likewise, *Student's* teachers consistently gave him passing grades. However, *Student's* actual work samples, his IEPs and his report cards all document a long history of not performing at grade level. Tr. Vol. 5, ll. 9-21; Pet. Ex. 36;

69. *Student's* cognitive testing shows that *Student* has an average IQ. Pet. Ex. 7; Pet. Ex. 47; Pet. Ex. 160. However, virtually every evaluation, including CMS's own evaluations, show *Student* is not performing anywhere near his potential.

70. *Mother* testified to her extensive involvement with the school, including serving as the Exceptional Children (EC) chairperson on the PTA for the 2004/2005 and 2005/2006 school years, room mother for *Student's* class for the 2003/2004 and 2004/2005 school years, test proctor, and other volunteer activities. Tr. Vol. 4, p. 25, ll. 22-25; p. 26, ll. 1-19; p. 27, ll. 8-10.

71. As the EC chairperson *Mother* acted as a liaison between the EC teachers and the PTA or Principal in obtaining approval and funding for requested items for the classroom or school for EC students. Tr. Vol. 4, p. 20, ll. 7-25.

72. *Mother* testified to her advocacy on behalf of the EC students at B. Elementary. These included obtaining a water fountain for an EC classroom, playground equipment for physically disabled children, a bigger classroom for one of the EC classes that had children with sensory, anxiety and movement issues. Tr. Vol. 4, p. 21, ll. 12-25; p. 23, ll. 14-25; p. 24, ll. 1-16,

73. *Mother* advocated for EC students in schoolwide projects. Tr. Vol. 4, p. 19, ll. 19-25; p. 20, ll. 1-5. She testified to one particular time when the whole school participated in a book-making project where they wrote and published their own stories. *Student* learned of the project

and wanted to know why his class did not participate. *Mother* testified that she forced the issue until the EC students were allowed to do the project. Tr. Vol. 4, p. 24, ll. 18-25; p. 25, ll. 1-17.

74. *Student* received private occupational therapy (OT) at his parent's expense through Integrative Therapy Concepts, Inc. for approximately one year during the 2004/2005 school year. Integrative Therapy evaluated *Student* on March 10, 2004 and recommended OT to address sensory processing issues and motor coordination, strength and endurance. Tr. Vol. 5, p. 56-59; Pet. Ex. 8.

75. On February 24, 2004, CMS conducted an OT evaluation and recommended OT to address handwriting and upper extremity bilateral use. Tr. Vol. 5, p. 63-68; Pet. Ex. 9.

76. *Mother* shared information and was very open with *Student's* teachers regarding *Student's* medical status and behavior needs. Each school year she provided a profile of *Student* to his teachers outlining his strengths and weaknesses and a guide as to how the family handled certain issues at home if they should occur at school. Any time *Student's* diagnosis or medication changed *Mother* informed the school of any potential side effects. Tr. Vol. 4, p. 42, ll. 2-20; Pet. Ex. 145.

77. *Mother* made a presentation on bipolar children at an inservice training for the teachers at ABC Elementary School at the request of D.S., the school psychologist. She also participated in an Aspergers inservice training. Tr. Vol. 4, p. 42, ll. 22-25; p. 43, ll. 1-15.

78. *Mother* communicated often with *Student's* teachers. She testified that she had a great rapport with the teachers at ABC Elementary School and even socialized with them. For 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> grade, *Mother* communicated with a daily journal that went back and forth between school and home. In 5<sup>th</sup> grade *Mother* began communicating through email at the request of *Student's* teacher. *Mother* testified that it was important to have that daily communication so that the teachers were informed of any issues that might arise at school and vice versa. Tr. Vol. 6, p. 181-83; p. 217, ll. 2-4; Vol. 7, p. 57-58; Pet. Ex. 132.

79. *Student* has had issues with encopresis over the years. When things are difficult or his anxiety level is high, *Student* wets himself without remembering. *Father* and *Mother* have sought medical intervention and have even tried medication but it does not work. *Student* does much better over the summer when he is not in school. *Student* has regressed in this area. *Mother* provides a duffle bag with extra clothes for the school. Currently she gets called at least four times a week to bring more clothes to the school. Tr. Vol. 4, p. 55, ll. 3-25; p. 56, ll. 1-10; Pet. Ex. 47.

80. *Student* enjoys music, art, theater, dancing and singing. He participates in a community theater group and at the time of trial was rehearsing to perform in one of the leading roles. It is his third show with the theater group. Tr. Vol. 4, p. 57, ll. 17-25; p. 58, ll. 1-6; Tr. Vol. 6, p. 221, ll. 15-17; Vol. 7, p. 54-55; Pet. Ex. 146.

81. *Student* also likes to write books. He has written two books, one completely on his own and the other with a friend from school. He is currently working on a 3<sup>rd</sup> book. Tr. Vol. 6, p. 221, ll. 18-25; p. 222, ll. 1-9; Vol. 7, p. 54, l. 8.

82. *Father* and *Mother* are loving parents who try to teach *Student* proper behavior. *Mother* testified to the different discipline techniques they have utilized with *Student*. They currently use charts, monetary incentives, and time-outs in his room. In addition, for some behaviors, he has to write a letter of apology. Tr. Vol. 4, p. 58-62.

83. In November, 2004, *Mother* and *Father* took *Student* to Huntington Learning Center. *Mother* and *Father*'s concerns were for both *Student*'s academic development and his social-emotional development. Tr. Vol. 1, p. 79, 3-6. *Student* received services from Huntington from November 20, 2004 until June 8, 2006. Tr. Vol. 1, p. 26, ll. 20-23.

84. Huntington Learning Center (Huntington) is a supplemental education center that works with all ages in filling in any gaps the student might have in their educational skills. Tr. Vol. 1, p. 18, ll. 13-20

85. Ms. WS, the Director of Education with Huntington, taught for 30 years in public schools and for 6 years with Huntington. Ms. WS's job duties at Huntington include testing and evaluating children, teaching, developing curriculum plans, conferencing with parents and with teachers and principals. Tr. Vol. 1, p. 17, ll. 20-25; p. 18, ll. 1-10 and 23-25; p. 19, ll. 1-3.

86. Ms. WS testified that Huntington begins by evaluating a child to determine his or her academic weaknesses. From there a program is developed to address those weaknesses and an estimate is given for the time needed to address those weaknesses. Huntington's two levels of instruction include basic instruction which is one-to-one with an instructor sitting next to the student. The second level, advanced instruction, the teacher stands and may work with another student at times in order to develop independence. Tr. Vol. 1, p. 22, ll. 15-25; p. 23, ll. 1-12.

87. Huntington assigns a counselor to conduct interim conferences (IC) with parents at least monthly to evaluate the student's progress, to see what is going on at school, to determine whether a meeting should be held with the student's teachers, or any other type of support the student might need. Tr. Vol. 1, p. 18, ll. 23-25; p. 19, ll. 1-3; p. 25, ll. 21-25; p. 26, ll. 1-4.

88. Huntington provides services to a student based on the student's particular academic needs. Huntington utilizes a standard curriculum that is published by McGraw-Hill that is individualized to strengthen any areas of weakness of the particular student. Tr. Vol. 1, p. 19, 17-21. Huntington works with both regular education and special education students. Tr. Vol. 1, p. 20, ll. 23-24. Ms. WS has worked with approximately 75 to 100 special education students. Tr. Vol. 1, p. 21, ll. 22-25.

89. Huntington is on CMS's approved list of supplemental education providers, is certified through SETA and is accredited through the Southern Association of Colleges and Schools. Tr. Vol. 1, p. 23, ll. 18-20; p. 24, ll. 10-16.

90. Ms. WS worked with *Student* as both a teacher and in a counseling role.

91. In November 2004, Huntington evaluated *Student* utilizing the Slosson Visual-Motor Performance, Rosner Test of Auditory Perception, Shaw Phonetic Analysis, IOTA Sight Word Test, Slosson Oral Reading Test, Informal Reading Inventory Achievement Test, and Silent Reading Inventory standardized tests. Tr. Vol. 1, p. 180, ll. 21-25; p. 181, ll. 1-4; Pet. Ex. 29. He

was also evaluated with a Math Placement Exam and Writing Sample test that is generated by Huntington. Tr. Vol. 1, p. 182, ll. 21-25.; Pet. Ex. 29.

92. The Slosson Visual-Motor Performance tests a student's visual perception skills. Tr. Vol. 1, p. 184, ll. 20-23.

93. The Rosner Test of Auditory Perception looks at how students perceive sounds in words to determine whether a student is able to differentiate vowel sounds and beginning and ending sounds. *Student* scored at a 3<sup>rd</sup> grade level. Tr. Vol. 1, p. 185, ll. 2-9.

94. The Chall Phonetic Analysis determines whether a child has mastered sound –symbol associations for consonants, vowels, blends, clusters, digraphs, diphthongs silent “E” and syllabication. Of the nine areas tested, *Student* indicated mastery of only five.

95. The Slosson Oral Reading Test requires that a student read a list of words that should be comfortable for them at their current grade level. The goal is for the student to be working one year above his then current grade level (4<sup>th</sup> grade, 3<sup>rd</sup> month) because many of the words in his curriculum were above the 4<sup>th</sup> grade level. *Student* scored at a 3<sup>rd</sup> grade, 2<sup>nd</sup> month level. Tr. Vol. 1, p. 188, ll. 1-15.

96. Huntington administered the Vocabulary, Reading Comprehension and Math Concepts parts of the California Achievement Test (CAT). Tr. Vol. 1, p. 57, ll. 2-6. Huntington's goal for is for its students to test in the 77<sup>th</sup> to 80<sup>th</sup> percentile in math on the CAT. *Student* scored in the 1<sup>st</sup> percentile. Tr. Vol. 1, p. 58, ll. 2-5.

97. Huntington's initial evaluations showed *Student* to have deficiencies in organizing and completing a task requiring attention to detail, phonics, decoding at a 3.2 grade equivalent, reading comprehension and vocabulary, no mastery beyond basic subtraction in math and significant weaknesses in spelling, sentence formation and structure, grammar, paragraph formation and structure and handwriting. Tr. Vol. 1, p. 62, ll. 21-25; p. 63, ll. 1-18; Pet. Ex. 25.

98. *Ms. B.S.*, a teacher and administrator with Huntington Learning Center, is a licensed teacher who taught for three years in CMS prior to coming to Huntington. Tr. Vol. 1, p. 178, 7-23. She is four hours from completing her master's degree in reading. Tr. Vol. 1, p. 179, ll. 23-25; p. 180, ll. 1-4.

99. When *Student* started at Huntington, *Ms. B.S.* served as the counselor who met monthly with *Mother* and *Father* to discuss *Student's* progress. *Ms. B.S.* also met with *Mother* and *Father* to interpret Huntington's evaluation results and the curriculum areas that Huntington planned to utilize to address *Student's* academic needs. Tr. Vol. 1, p. 198, ll. ; p. 209, ll. 16-19. Pet. Ex. 23.

100. In April 2005, *Ms. B.S.*, from Huntington Learning Center, wrote a letter to ABC Elementary School reviewing the progress that *Student* was making at Huntington and recommending that *Student* be placed in some mainstream classes for the following school year. Tr. Vol. 1, p. 211, ll. 1-25; p. 212, ll. 1-21; Pet. Ex. 28. *Ms. B.S.* served in both a counseling and a teaching role with *Student* Tr. Vol. 1, p. 217, ll. 9-14.

101. During the 2004/2005 school year, *Mother* and *Father* expressed concerns to *Ms. B.S.* at Huntington regarding *Student's* education at B.. She recalled that *Mother* and *Father* were concerned that *Student* was not being challenged enough, that he was not progressing to his capabilities, that there had been specific conferences between *Mother* and *Father* and the school where certain strategies or suggestions were discussed but that the school had not followed through. Tr. Vol. 1, p. 214, ll. 3-12.

102. *Ms. B.S.* recalled meeting with *Student's* teachers and *Ms. A.P.*, the assistant principal on two occasions regarding what *Student* was working on at Huntington and in the classroom. Tr. Vol. 1, p. 215, ll. 14-25.

103. On November 8, 2005, *Ms. WS* wrote a letter at the request of *Mother* explaining the deficits being addressed by Huntington and the amount of instruction *Student* had received.

104. Huntington initially had math as part of *Student's* original educational plan. However, it was decided that *Student's* greatest need was in reading and that some of his struggles in math stemmed back to his reading. Therefore, math was only addressed on a limited basis. Tr. Vol. 1, p. 58, ll. 14-16, 22-25; p. 59, ll. 7-11; p. 217, ll. 15-22; p. 218, ll. 1-5; Vol. 7, p. 41-42.

105. Huntington's original plan for *Student* included addressing his deficits in math. However, it was determined that his greater need was to get his reading skills more When Huntington evaluated *Student* in November, 2004, he was expected to be performing at the 4<sup>th</sup> grade, 5<sup>th</sup> month level. Tr. Vol. 1, p. 43, ll. 24-25. Huntington gave *Student* the Rosner Test of Auditory Perception and the Shaw Phonetic Analysis to evaluate *Student's* phonics and decoding skills. Tr. Vol. 1, p. 42, ll. 17-25; Huntington utilized the IOTA Sight Word Test to evaluate *Student's* sight word vocabulary. *Student* tested at a 3<sup>rd</sup> grade, 4<sup>th</sup> month level in sight word vocabulary. Tr. Vol. 1, p. 43, ll. 1-8.

106. Huntington works on-on-one with *Student* on specific skills in reading. Huntington documented *Student's* progress on each skill set and did not move to the next level until *Student* understood the skill, is able to correct any errors and was achieving mastery. Tr. Vol. 1, p. 48, ll. 12-17. Huntington worked on building *Student's* confidence by starting at a slightly lower level than he was capable in order build his motivation. Tr. Vol. 1, p. 242, ll. 6-13.

107. *Mother* testified that she saw improvement within a couple of months of *Student* starting at Huntington. She stated that, while *Student* knew how to read, he did not understand what he was reading. *Student* even remarked that Huntington taught him to read when he was proud of his ability to read a birthday card to his uncle. Tr. Vol. 7, p. 40, ll. 2-20.

108. Huntington originally estimated that it would take approximately 198 hours of individualized instruction to address *Student's* issues. Pet. Ex. 26; Tr. Vol. 1, p. 65, ll. 17-20.

109. During the 2005/2006 school year, Huntington began working with writing. *Student's* issues with writing included incomplete sentences, lack of sequencing in relating events, grammatical convention, spelling and supporting his ideas fully with details. Tr. Vol. 1, p. 53, ll. 5-9.

110. ABC Elementary School knew that *Student* was receiving tutoring services at Huntington. Tr. Vol. 5, p. 121, ll. 9-17; Pet. Ex. 149. Huntington began working with *Student* at a 1<sup>st</sup> grade, 6 month level in order to build confidence and eliminate some of the frustration. Tr. Vol. 1, p. 44, ll. 7-11.

111. Ms. WS testified that when *Student* learns a new skill he needs one-to-one instruction and a flexible approach to instruction in order to find what works for him. Tr. Vol. 1, p. 80, ll. 20-21. Ms. WS testified that based on her experience teaching *Student*, the evaluation from the Student Success Center in Chapel Hill, North Carolina properly identified *Student's* needs and the processes and ways that will assist *Student* in learning effectively. Tr. Vol. 1, p. 82, ll. 12-25; p. 84, ll. 17-25.

112. *Student* had a more difficult time with anxiety at Huntington when he came on school days rather than Saturdays. Ms. WS testified that *Student* expressed frustration with not being able to do what he was asked to do at school. Tr. Vol. 1, p. 145, ll. 10-24.

113. Ms. WS testified that in her opinion *Student* needs an inclusion teacher to work directly with *Student*, who could provide a variety of learning opportunities to address his different learning style and rate. Tr. Vol. 1, p. 86, ll. 6-25; p. 87, ll. 1-10. Based on her knowledge of *Student's* needs, the inclusion teacher could only handle one other special needs student in addition to *Student* Tr. Vol. 1, p. 160, ll. 1-3

114. *Mother* and *Father* spent \$7,519 for services for *Student* at Huntington. Tr. Vol. 1, p. 70, ll. 20-25; Pet. Ex. 27. *Student* does not currently attend Huntington due to the expense, *Student* received ESY through the school system over the summer and *Student* does not get home from school until 4:30pm. Tr. Vol. 7, p. 42, ll. 17-25,

115. Ms. WS attended the June 6, 2006 IEP meeting. She recalled that *Mother* and *Father* were concerned about *Student's* transition to middle school and his lack of preparedness given his weak academic skills. Tr. Vol. 1, p. 76, ll. 22-25; p. 77, ll. 1-4.

116. *Mother* and *Father* were very involved with *Student's* education at Huntington. They attended monthly parent conferences to review *Student's* progress, had frequent telephone calls with Ms. WS and, unlike most parents of children enrolled at the center, would stay at the center during *Student's* tutoring sessions in case they were needed during the instructional session. Tr. Vol. 1, p. 79, ll. 3-19.

117. *Student* scored a scale score of 247 on the 5<sup>th</sup> grade reading end-of-grade test (EOG). His score placed him at the 12<sup>th</sup> percentile as compared with other 5<sup>th</sup> grade students. The score gave him just barely a Level 3 for the test. Tr. Vol. 1, p. 146, ll. 7-20A student must score a Level 3 or 4 in order to be considered on grade level.

118. The 5<sup>th</sup> grade end-of-grade test and Star Reading test are multiple choice tests for reading comprehension. A student a student can refer back to text in order to answer questions. Tr. Vol. 1, ; p. 126, ll. 21-25; p. 127, ll. 1-8. For the Star Reading test the student chooses the reading material based on his or her interest. Tr. Vol. 1, p. 176, ll. 15-17.

119. Ms. Freeman, a certified educational planner, who owns the Davidson Center for Learning and Academic Planning in Davidson, North Carolina (Davidson Center) testified in behalf of the petitioners.

120. The Davidson Center is accredited by SETA as a supplementary school which allows it to provide GED and other courses for credit. Tr. Vol. 2, p. 38, ll. 2-9. In addition, the Davidson Center provides special education services to a private school in Davidson, North Carolina. Tr. Vol. 2, p. 37, ll. 2-9.

121. Ms. Freeman testified that she works closely with Dr. Gary Patrick, a licensed psychologist who has expertise in identifying learning issues with children. Over the past seven years, she has worked with him in evaluating approximately 200 children. Tr. Vol. 2, p. 27, ll. 18-25. The evaluation process involves Dr. Patrick performing the psychological-emotional portion of the evaluation and Ms. Freeman conducting the educational evaluation. Dr. Patrick and Ms. Freeman then meet for approximately two hours with the child's parents in order to present the evaluation results and to make specific recommendations to address the child's needs. Tr. Vol. 2, p. 28, ll. 2-8.

122. In addition to providing evaluations and recommending educational placements for children, Ms. Freeman's center provides tutoring for grades 1 through 12, SAT test preparation, and college planning. Tr. Vol. 2, p. 35, ll. 19-24. As a licensed Education Center, the center also has summer school programs including study skills and credited coursework.

123. Ms. Freeman worked in public schools for 20 years as a teacher and guidance counselor. She has a master's degree in education and counseling. Tr. Vol. 2, p. 7, ll. 9-11.

124. As a Certified Educational Planner, Ms. Freeman assists families by gathering information regarding the educational and emotional needs of a child, including some kind of formal evaluation by a psychologist. Ms. Freeman then assists with finding an appropriate environment for the child which could include private or public schools. In addition, Ms. Freeman assists with developing a specific plan for dealing with whatever the child's weaknesses are. Tr. Vol. 2, p. 10, ll. 3-17.

125. Ms. Freeman testified that *Student* has problems sitting still and that he has several movements. She noted that some movements seemed to be involuntary. Tr. Vol. 2, p. 66, ll. 15-23.

126. Ms. Freeman testified that *Student* was three years below his age level for basic decoding skills and that he needed intensive remediation in that area. Tr. Vol. 2, p. 71, ll. 7-23. *Student* has a serious auditory processing deficit. Tr. Vol. 2, p. 72, ll. 6-10.

127. Ms. Freeman recommended remediating *Student's* reading decoding skills using an Orton-Gillingham program, the Fast Forward program, or the Wilson Reading Program. Tr. Vol. 2, p. 72, ll. 11-21.

128. On September 9, 2006, Ms. Freeman evaluated *Student* utilizing the Peabody Picture Vocabulary Test and the Woodcock-Johnson III Test of Achievement (2006 Woodcock-Johnson). Tr. Vol. 2, p. 129, ll. 11-17.

129. The Peabody Picture Vocabulary Test measures receptive language. *Student* obtained a low average standard score of 86, which placed him at an age equivalent of 9 years, 9 months. Tr. Vol. 2, p. 130, ll. 7-11; Pet. Ex. 1.

130. In March 9, 2004, CMS evaluated *Student* utilizing the Woodcock-Johnson III Test of Achievement (2004 Woodcock-Johnson). Pet. Ex. 80. Ms. Freeman testified that in comparing *Student's* Woodcock-Johnson results from March 2004 to his scores in September 2006, *Student* had decreased in his percentile rank in virtually every area except letter-word identification. Pet. Ex. 1, 80, and 161. Ms. Freeman testified that she interpreted those results to mean that *Student* did not learn anything in a lot of areas during the two and a half years that passed from March, 2004 until September, 2006. Tr. Vol. 2, p. 158, ll. 3-17. .

131. When comparing *Student's* age equivalent scores from the 2004 Woodcock-Johnson to the 2006 Woodcock-Johnson, *Student* showed slight growth in some areas, no growth in some areas and actual regression in some areas. Tr. Vol. 2, p. 165, ll. 7-25; p. 166, ll. 1-25; p. 167, ll. 1-2; Pet. Ex. 1, 80, and 161.

132. Ms. Freeman testified that *Student* is in need of intensive remediation and that if he does not get remediation he will continue to decline in his test scores. Tr. Vol. 3, p. 49, ll. 21-25; p. 50, 1-5.

133. Ms. Freeman testified that the most reliable way to make comparisons to determine overall growth is to compare standard scores and age equivalents. Tr. Vol. 2, p. 162, ll. 24-25; Tr. Vol. 3, p. 6-12.

134. Ms. Freeman testified that her recommendation would be a specialized school for children with learning disabilities for *Student*. She testified that she would recommend Manus Academy in Charlotte because it could best meet *Student's* needs by remediating his deficits in not only his academic skills but also his auditory and visual perceptual processing deficits. According to Ms. Freeman, for children who are not ready to function in a small class, the school begins with one-on-one instruction, moves to two-to-one instruction and progresses until the child is ready for a six-to-one instruction which is the largest class size it offers. Tr. Vol. 2, p. 184, ll. 13-15; p. 190, ll. 9-18; Tr. Vol. 3, p. 54, ll. 9-15.

135. Ms. Freeman testified that based on the evaluation results from Davidson, *Student* would not be successful in a mainstream public school classroom because he is not currently functioning on grade level in any area, he has significant auditory processing deficits that would make it difficult for him to hear in a class of 28 to 30 children, and that his level of anxiety is so high that a mainstream environment would not be conducive to his learning. Tr. Vol. 2, p. 186, ll. 15-25.

136. *Student's* anxiety and self-esteem issues relate directly to his frustrations with school. *Mother's* concern is that if *Student* does not become more successful in school, he will drop out or commit suicide. Tr. Vol. 7, p. 64-66

137. Ms. Freeman testified that in her opinion, *Student* is capable of going to college if he receives the remediation he needs in conjunction with other interventions. Tr. Vol. 3, ll. 13-18.

138. The Undersigned found the testimony of Petitioner's witnesses to be credible, convincing, and consistent.

139. Respondent did not present any evidence to dispute the testimony of Petitioner's witnesses.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and the preponderance of the evidence, the Undersigned makes the following Conclusions of Law:

1. The Office of Administrative Hearings has jurisdiction of this contested case pursuant to Sections 150B and 115C of the North Carolina General Statutes and the Individuals with Disabilities Act (IDEA) and the Individuals with Disabilities Improvement Act (IDEA 2004), 20 U.S.C. § 1400 *et. seq.* and implementing regulations (34 C.F.R. Part 300).

2. There is no dispute that *Student* is a child with special needs pursuant to N.C. Gen. Stat. § 115C-109 and is entitled to a free and appropriate public education (FAPE) pursuant to IDEA and IDEA 2004 (20 U.S.C. § 1412(a)(1); 34 C.F.R. 300.121), the North Carolina General Statutes, and the *North Carolina Procedures Governing Procedures Governing Programs and Services to Children with Disabilities* (North Carolina Procedures).

3. *Student's* area of eligibility under IDEA and IDEA 2004 is other health impaired (OHI).

4. Petitioners have the burden of persuasion in this case. *Schaffer v. Weast*, \_\_\_ U.S. \_\_\_\_ (2005).

5. The IDEA defines FAPE as that which provides a disabled student with personalized instruction and sufficient support services to enable the student to benefit from the instruction. *Board of Education v. Rowley*, 485 U.S. 176, 203 (1982); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 980 (4<sup>th</sup> Cir. 1990).

6. North Carolina places great significance on education. The public policy regarding special education is "to provide full educational opportunity to all children with disabilities who reside in the State." N.C. Gen. Stat. 115C-106.1 (2006).

7. The North Carolina Supreme Court has recognized a constitutional right to a "sound, basic education" for all students, whether disabled or not. A sound, basic education is defined as one that provides at a minimum:

(1) sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society;

(2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices

with regard to issues that affect the student personally or affect the student's community, state, and nation;

(3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and

(4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in formal education or gainful employment in contemporary society.

*Hoke County v. State*, 358 N.C. 605 (2004) (quoting *Leandro v. State*, 346 N.C. 336, 347 (1997)).

8. IDEA 2004 explicitly states that the goal of the law is “to provide students with disabilities an education that is designed to meet their unique needs and prepare them for further education, employment or independent living.” 20 U.S.C. § 1400(d)(1)(A) (2004).

9. The IDEA requires that children with disabilities be offered a FAPE. A child is deprived of FAPE if the school system violates the IDEA's procedural requirements to such an extent that the violations detrimentally impact upon the child's right to a free, appropriate public education or, if the IEP that is developed by the school is not reasonably calculated to enable the child to receive educational benefit. *Bd. of Educ. of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-7 (1982); *Hudson v. Wilson*, 828 F.2d 1059, 1063 (4th Cir. 1987).

10. The IDEA requires that an individualized education program (IEP) be “developed, reviewed, and revised” that includes, among other things, the child's present levels of educational performance and measurable annual goals that include benchmarks or short-term objectives. See 20 U.S.C. § 1414(d)(1)(A). Present levels of performance should include “how the child's disability affects the child's involvement and progress in the general curriculum.” *Id.* at 1414(d)(1)(A)(i). The free appropriate public education mandated by the IDEA must be designed for the specific needs of the child through the IEP, which is “a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” *School Committee of the Town of Burlington v. Dept. of Educ.*, 471 U.S. 359, 368 (1985). Instruction must be specially designed to meet the child's unique needs so that the child will learn. If the LEA fails and the child learns in another environment, the parents are entitled to be reimbursed for securing and paying for the education that did teach their child to read and write.

11. *Student's* present levels of performance were wholly inadequate. They virtually remained the same year after year. Likewise, *Student's* goals remained virtually unchanged, despite CMS's progress reports stating that *Student* was making progress on his goals. *Student's* IEPs violated the IDEA's procedural requirements of the IDEA.

12. *Student* made progress at Huntington Learning Center and it was appropriate for *Mother* and *Father* to seek tutoring services through Huntington. *Mother*, Ms. WS and *Ms. B.S.* testified to the progress and the program that was developed for *Student* at Huntington. CMS presented no evidence to dispute their testimony.

13. The IDEA provides that a court “shall grant any relief the Court feels is appropriate.” That relief can be reimbursement for private school tuition or a “prospective injunction directing the school to develop and implement at public expense an IEP placing the child in private school.” *School Committee of the Town of Burlington v. Dept. of Educ.*, 471 U.S. 359, 395 (1985)

14. The IDEA and IDEA 2004 provides that parents are entitled to an independent educational evaluation (IEE) at public expense if they disagree with an evaluation of the LEA. If the parent requests an IEE the LEA “must, without unnecessary delay, either—

- 1) Initiate a hearing . . . to show that its evaluation is appropriate; or
- 2) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing . . . that the evaluation obtained by the parent did not meet agency criteria.

34 C.F.R. 300.502 (1999).

13. CMS did not respond in a timely manner to *Mother and Father.*’s request for an IEE. It did not request a hearing to dispute whether the Student Success Center evaluation met agency criteria nor did it initiate a hearing to show its evaluation was appropriate. When CMS did respond it did not respond as required under the IDEA.

14. The North Carolina Administrative Procedure Act (APA) provides that the time limit for filing a contested case against a state agency commences when “notice is given of the agency decision to all persons aggrieved. . . . The notice shall be in writing and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition.” N.C. Gen. Stat. § 150B-23(f). The limitations period is not triggered unless “clear and complete written notice” that complies with the statute is provided. *C.M. v. Bd. of Educ. of Henderson County*, 241 F.3d 374, 383 (2001).

15. CMS did not present any evidence of the required notice for *Mother and Father.*’s request for reimbursement for the expenses they incurred at Huntington Learning Center or for the IEE from Student Success Center. In fact, CMS has yet to provide notice that is compliant with the notice requirements of the APA.

16. The North Carolina General Assembly recently rewrote the Laws Governing the Education of Children with Special Needs to include a one-year statute of limitations for filing a due process petition effective July 10, 2006. *See* N.C. Gen. Stat. § 115C-109.6(b). Since CMS has not provided notice pursuant to § 150B-23(f) based on their request for reimbursement for Huntington and Student Success Center expenses, *Mother and Father* are entitled to reimbursement.

17. The IDEA requires that Prior Written Notice must be given to the parents of a child with a disability a reasonable time before the LEA proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child; or refuses to initiate or change the identification, evaluation or educational

placement of the child or the provision of a free appropriate public education to the child. 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a).

18. The Prior Written Notice must include a description of the action proposed or refused by the LEA and the reason the action is being refused or proposed; a description of other options considered by the agency and why those options were rejected; a description of each evaluation procedure, test, record, or report the agency used as a basis for accepting or rejecting the proposed action; a description of other factors that are relevant to the LEA's decision, a statement regarding the parent's procedural safeguards and contacts parents can seek assistance from. 20 U.S.C. § 1415(c); 34 C.F.R. § 300.503(b).

19. Virtually every Prior Written Notice provided by CMS was procedurally inadequate. Most notably the Prior Written Notices surrounding *Student's* change of placement from a self-contained to resource setting. While the decision to change his placement occurred in April 2005, CMS did not actually change his placement until August 2005. The Prior Written Notice does not describe any other options considered nor any evaluations, procedures, tests, records or reports utilized to make the decision. Moreover, the only item initially changed on *Student's* IEP was the amount of special education he was to receive.

20. Likewise, CMS provided Invitation to Conferences that did not reflect what was to be discussed at meetings and in the case of the meeting on December 1, 2005, refused to have an IEP meeting after notifying *Mother* and *Father* that there would be an IEP meeting.

21. The IDEA emphasizes the parent's participation in the development of a child's IEP and evaluating its effectiveness. *School Committee of the Town of Burlington v. Dept. of Educ.*, 471 U.S. 359, 368 (1985); citing 20 U.S.C. §§ 1400(c), 1401(19), 1412(7), 1415(b)(1)(A), (C), (D), (E), and 1415(b)(2); 34 C.F.R. § 300.345 (1984). CMS prevented *Mother* and *Father* from meaningful participation in *Student's* education by not providing compliant prior written notices and invitations to conferences; misleading them with progress reports and report cards reporting progress despite *Student's* continued performance below grade level, and not providing requested information needed to help them make decisions regarding *Student's* education..

22. Counsel for Respondent contends that *Student* made adequate progress because *Student* passed his reading EOG and scored at grade level on the Star Reader. However, these two results do not outweigh the other data showing *Student's* lack of progress and, in some areas, regression. Promotions and minimal improvements on some test results do not prove that a school provided a free and appropriate public education. *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (1985). "FAPE must be tailored to the individual child's capabilities and that while one might demand only minimal results in the case of the most severely handicapped children, such results would be insufficient in the case of other children." *Id.*

23. CMS violated both the procedural and the substantive requirements of the IDEA. "Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student." *G. v. Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4<sup>th</sup> Cir. 2003).

## **DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned finds:

1. That the Respondent shall reimburse the Petitioners \$3,250.00 for the costs of the independent educational evaluation from the Student Success Center in Chapel Hill, North Carolina.
2. That the Respondent shall reimburse the Petitioners \$3,312.00 for the costs of the tutoring expenses they incurred from Huntington Learning Center.
3. That Respondent shall convene an IEP meeting in order to develop an IEP that will appropriately serve *Student's* special needs.
4. That Respondent will hire an independent consultant with the consent of the parent to assist the Respondent with developing an appropriate IEP. The IEP will be consistent with Ms. Freeman and Ms. WS's recommendation concerning one-on-one remediation of *Student's* needs in reading, math and written expression.
5. That Respondent will pay all expenses for the independent consultant and will retain their services for a period of two years.
6. That the Petitioners are the prevailing parties for the purposes of the award of attorneys fees and litigation costs.

## **NOTICE**

Any party aggrieved by this decision may appeal this decision within 30 days after receipt of notice by filing a written notice of appeal with the Superintendent of Public Instruction as provided by N.C. General Statute 115C-116(h) and (i).

This the \_\_\_\_\_ day of January, 2007.

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The Honorable William A. Creech  
Temporary Administrative Law Judge